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JURISDICTIONAL STATEMENT

On January 4, 2000, Appellants brought their cause of action in the Circuit Court of Jefferson County against Respondents Mid-America Transplant Services (hereinafter "MTS"), Jefferson Memorial Hospital (hereinafter "Hospital" or "JMH"), and Christopher Guelbert, RN (hereinafter "Guelbert") for intentional infliction of emotional distress, breach of contract, and mutilation of a dead body. (L.F. 13). All Respondents filed Motions for Summary Judgment. (L.F. 65, 188). The Honorable Gary P. Kramer granted summary judgment for MTS on June 14, 2002 and for the Hospital and Guelbert on July 5, 2002. (L.F. 186, 337). Appellants appealed to the Missouri Court of Appeals for the Eastern District. (L.F. 338).

On July 22, 2003 , the Missouri Court of Appeals for the Eastern District affirmed the trial court's ruling granting summary judgment as to Respondent MTS, but reversed the ruling as to Respondents Hospital and Guelbert and remanded the action for further proceedings. (See Appendix A15-A25). On October 28, 2003 the Missouri Supreme Court granted Appellants' and Respondents' JMH and Guelbert's Application for Transfer pursuant to Rule 83.04 of the Missouri Supreme Court Rules. (See Appendix A26). This appeal is properly before this Court because of this Court's Order of Transfer and because this action is one involving the interpretation of Missouri's Uniform Anatomical Gift Act. Mo. Rev. Stat. §§ 194.210 to 194.290 (2002).

STATEMENT OF FACTS

On November 28, 1998, Frank Schembre entered the emergency room at Jefferson Memorial Hospital (hereinafter "Hospital" or "JMH") suffering from a heart attack. (L.F. 72- 73). He was pronounced dead at approximately 6:30 p.m. (L.F. 73). Shortly thereafter, Christopher Guelbert (hereinafter "Guelbert"), a registered nurse, approached Thelma Schembre, wife of the deceased, and Bobby Joe Schembre and Laurie Laiben, children of the deceased. (L.F. 87, 109). Mr. Guelbert was an employee of JMH. (L.F. 81). Mr. Guelbert proceeded to discuss the possibility of organ and tissue donation with the Schembre family. (L.F. 87).[1] The family told Mr. Guelbert that they could not recall specific conversations with the decedent regarding organ and tissue donation. (L.F. 87). However, the family believed that organ and tissue donation was

[1] Missouri's Uniform Anatomical Gift Act mandates that when there is a suitable candidate for organ or tissue donation that the hospital request consent to the donation of anatomical gifts. Mo. Rev. Stat. § 194.233 (2002). In 1998 the United States Department of Health and Human Services announced additional rules to increase organ and tissue donation. Changes to the Conditions of Participation for hospitals receiving Medicare and Medicaid reimbursement require hospitals to notify, in a timely manner, their designated organ procurement agency of individuals whose death is imminent or who have died in the hospital. It also requires hospitals to ensure that the family of every potential donor is informed of its option to donate organs or tissues. 42 CFR § 482.45.

the type of thing that the decedent would have wanted to do to help others. (L.F. 87).

Mr. Guelbert then contacted Mid-America Transplant Services (hereinafter "MTS") to determine whether the deceased was a suitable candidate for tissue donation. (L.F. 219). Mr. Guelbert informed the family that the decedent was not a suitable candidate for organ donation since organ donation is typically only viable for patients who have been on life support. (L.F. 88). However, he advised the family that decedent was a candidate for tissue donation and, specifically, bone and corneas. (L.F. 89, 219-20).

Mr. Guelbert completed the organ and tissue donation consent form in the presence of Thelma Schembre. (L.F. 94, 112-113). The consent form reflects that boxes were checked "no" for heart, liver, kidneys, skin, pancreas, and "any needed tissue." (L.F. 77, 92, 113). Boxes were checked "yes" for "eyes" and "bone". (L.F. 77, 92, 113). Mrs. Schembre signed the organ and tissue donation consent form after it was completed by Mr. Guelbert. (L.F. 93, 113). Mr. Guelbert went through the consent form, item by item, and read it to Mrs. Schembre to make sure she understood what she was signing. (L.F. 225). Mrs. Schembre testified at her deposition that nothing on the consent form had changed since she signed it. (L.F. 256).

Appellants claim that Mr. Guelbert told them only two to four inches of the lower leg bone of one leg would be removed. (L.F. 111). Appellants did not have a detailed conversation with Mr. Guelbert regarding eye removal. (L.F. 110). Appellants also claim that an unnamed female nurse told them that the entire eye would not be removed. (L.F. 116). Mr. Guelbert testified that there was no discussion of a limitation

regarding the number of inches of bone or he would have written limitations on the consent form. (L.F. 93). Mr. Guelbert's understanding was that when "bone" was indicated on the form, all of the bones from the lower extremities would be removed. (L.F. 103). Mr. Guelbert testified that he explained to the Schembres that all the long bones of the legs would be removed. (L.F. 100).

MTS was contacted regarding Mrs. Schembre's consent to donate bones and eyes. (L.F. 124). Mr. Matthew Thompson, a tissue procurement coordinator, received and reviewed the tissue consent form. (L.F. 124). Mr. Thompson testified that the consent form was valid and included all of the information required. (L.F. 141). If the form had not been sufficient, he testified that MTS would have contacted Mrs. Schembre. (L.F. 126, 141). Mr. Thompson and two other MTS employees proceeded to Jefferson Memorial Hospital to procure tissues from the decedent. (L.F. 132- 133). Mr. Thompson was aware only of the limitations placed on the donation as stated on the consent form. (L.F. 134, 137). Those limitations were that the kidneys, liver, skin, pancreas, heart and "any other needed tissue" were not to be removed. (L.F. 77). Other than the form, no additional limitations were conveyed at any time to MTS personnel. (L.F. 137).

Upon arrival at the hospital, Mr. Thompson and the MTS tissue recovery team proceeded to remove tissues from the decedent in accordance with the consent form and MTS standard procedures. (L.F. 78, 134-135). In 1998, it was standard procedure when "bone" was checked to remove bones from the lower extremities. (L.F. 137). MTS removed decedent's femur, tibia, fibula, iliac crest, and fascia lata in the left and right

legs. (L.F. 78, 139). It was standard procedure when removing leg bones to remove the bones at the iliac crest, where the hip is located. (L.F. 133). It also was standard procedure to remove the attached fascia lata and connective muscles and tissues, when removing the leg bones. (L.F. 134). MTS also removed the decedent's eyes. (L.F. 139).

Subsequent to the retrieval of the eyes and leg bones when the Appellants were making funeral arrangements, they were advised by an employee of Vineyard Funeral Home that Mr. Schembre's height and the length of the casket were not a problem because they could just "stuff his legs in there." (L.F. 366). At the funeral home, Appellants were informed that all of the leg bones and "pelvic girdle" of the decedent had been removed. (L.F. 434). Appellants later came to believe that the decedent's heart was removed. (L.F. 434). The MTS procedure report form, as a standard, contains the typewritten phrase "whole heart removed." (L.F. 78, 140). However, none of the boxes or areas on the form were marked relating to heart removal. (L.F. 78, 140). Furthermore, the MTS recovery team did not remove decedent's heart. (L.F. 140).

Appellants filed their Petition for Damages on January 4, 2000 alleging intentional infliction of emotional distress, mental suffering and outrage as a result of the alleged mutilation of the body of Frank Schembre and that they were deprived of their common law right to a ceremonious and decent burial claiming that they only agreed to the donation of corneas and a two to four inch piece of bone from one calf. (L.F. 13-22). All Respondents filed Motions for Summary Judgment based in part on the Uniform Anatomical Gift Act. §§ 194.210 - 194.290. (L.F. 65, 188). After the motions were

briefed and argued, the Honorable Gary P. Kramer granted summary judgment for both Respondents. (L.F. 186, 337). Appellants appealed to the Missouri Court of Appeals for the Eastern District. (L.F. 338).

On July 22, 2003, the Missouri Court of Appeals for the Eastern District affirmed the trial court's ruling granting summary judgment as to Respondent MTS, but reversed the ruling as to Respondents JMH and Guelbert and remanded the action for further proceedings. (See Appendix A_{15}-A_{25}).

On October 28, 2003 the Missouri Supreme Court granted Appellants' and Respondents' JMH and Christopher Guelbert's Application for Transfer pursuant to Rule 83.04 of the Missouri Supreme Court Rules. (See Appendix A_{26}).

POINTS RELIED ON

1. THE TRIAL COURT DID NOT ERR WHEN IT GRANTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS JEFFERSON MEMORIAL HOSPITAL AND CHRISTOPHER GUELBERT, RN ON THE BASIS OF THE IMMUNITY PROVISIONS CONTAINED IN MISSOURI'S UNIFORM ANATOMICAL GIFT ACT § 194.270 BECAUSE:

A. Respondents Jefferson Memorial Hospital and Christopher Guelbert, RN Obtained a Valid Written Consent From Thelma Schembre Pursuant To Missouri's Uniform Anatomical Gift Act § 194.240

Kelly-Nevils v. Detroit Receiving Hospital, 526 N.W.2d 15 (Mich. Ct. App. 1994)

Nicoletta v. Rochester Eye & Human Parts Banks, Inc., 519 N.W.S.2d 928 (N.Y. Sup. Ct. 1987)

Lyon v. United States, 843 F. Supp. 531 (D. Minn. 1994)

Ramirez v. Health Partners of Southern Arizona, 972 P.2d 658 (Ariz. Ct. App. 1998)

Mo. Rev. Stat. § 194.220

Mo. Rev. Stat. § 194.233

Mo. Rev. Stat. § 194.240

Mo. Rev. Stat. § 194.270

Mo. Rev. Stat. § 194.280

Uniform Anatomical Gift Act (1968)

Uniform Anatomical Gift Act (1987)

Fla. Stat. § 765.517.5 (2002)

B. Respondents Jefferson Memorial Hospital and Christopher Guelbert, RN Acted in Good Faith in Accord with the Terms of Missouri's Uniform Anatomical Gift Act In Obtaining Thelma Schembre's Consent For The Donation Of The Eyes And Bones Of Her Deceased Husband

Andrews v. Alabama Eye Bank, 727 So.2d 62 (Ala. 1999)

Perry v. St. Francis Hospital and Medical Center, Inc., 886 F. Supp. 1551 (D. Kan. 1995)

Nicoletta v. Rochester Eye & Human Parts Bank , Inc., 519 N.Y.S.2d 928 (N.Y. Sup. Ct. 1987)

Ramirez v. Health Partners of Southern Arizona, 972 P.2d 658 (Ariz. Ct. App. 1998)

Mo. Rev. Stat. § 194.270

C. Respondents Jefferson Memorial Hospital and Christopher Guelbert, RN Acted Without Negligence In Accord With The Terms of Missouri's Uniform Anatomical Gift Act In Obtaining Thelma Schembre's Consent For Donation Of The Eyes And Bones Of Her Deceased Husband

Brickey v. Concerned Care of Midwest, Inc., 988 S.W.2d 592 (Mo. Ct. App. 1999)

Nicoletta v. Rochester Eye & Human Parts Bank , Inc., 519 N.Y.S.2d 928 (N.Y. Sup. Ct. 1987)

Ramirez v. Health Partners of Southern Arizona, 972 P.2d 658 (Ariz. Ct. App. 1998)

Mo. Rev. Stat. § 194.220

Mo. Rev. Stat. § 194.233

Mo. Rev. Stat. § 194.240

Mo. Rev. Stat. § 194.270

N.Y. Pub. Health Law § 4306.3

D. There Are No Genuine Facts In Dispute And Respondents Jefferson Memorial Hospital and Christopher Guelbert, RN Are Entitled To Summary Judgment As A Matter Of Law

Gunning v. State Farm Mutual Automobile Insurance Co., 598 S.W.2d 479 (Mo. Ct. App. 1980)

Hewitt v. Masters, 406 S.W.2d 60 (Mo. 1966)

ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371 (Mo. banc 1993)

Mitchell Engineering Company v. Summit Realty Co., Inc., 647 S.W.2d 130 (Mo. Ct. App. 1982)

Mo. Rev. Stat. § 194.270

ARGUMENT

STANDARD OF REVIEW

The standard of review on appeal regarding summary judgment is essentially de novo. ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp, 854 S.W.2d 371, 376 (Mo. banc 1993) . The criteria for testing the propriety of summary judgment are no different from that which should be employed by the trial court to determine the propriety of sustaining the motion initially. Id. Summary judgment will be upheld on appeal if there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. Id. at 377.

Where the movant is the defending party, the moving party "need not controvert *each* element of the non-movant's claim in order to establish a right to summary judgment." Id. at 381 (emphasis in original). The movant "may establish a right to judgment by showing (1) facts that negate *any one* of the claimant's elements [of] facts, (2) that the non-movant, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of *any one* of the claimant's elements, or (3) that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly-pleaded affirmative defense." Id. (emphasis in original).

In the case at bar, all of the above factors are satisfied. The Hospital and Guelbert are immune from suit pursuant to Missouri's Uniform Anatomical Gift Act because they acted without negligence and in good faith in accord with the terms of the Act in obtaining

written consent. Mo. Rev. Stat. § 194.270.[2] Respondents have established that they did not breach their duty to Appellants in obtaining a written consent in accordance with the statutory requirements of Missouri's Uniform Anatomical Gift Act. More importantly, Appellants have failed to produce evidence and will not be able to produce evidence sufficient to allow the trier of fact to find that Respondents Jefferson Memorial Hospital and Christopher Guelbert acted negligently or in bad faith in obtaining consent for the donation of Mr. Schembre's eyes and bones. Therefore, there is no genuine dispute as to the existence of each of the facts necessary to support Respondents' claim of the affirmative defense of immunity.

I. THE TRIAL COURT DID NOT ERR WHEN IT GRANTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS JEFFERSON MEMORIAL HOSPITAL AND CHRISTOPHER GUELBERT, RN ON THE BASIS OF THE IMMUNITY PROVISIONS CONTAINED IN MISSOURI'S UNIFORM ANATOMICAL GIFT ACT § 194.270 BECAUSE:

A. Respondents Jefferson Memorial Hospital and Christopher Guelbert, RN Obtained a Valid Written Consent From Thelma Schembre Pursuant To Missouri's Uniform Anatomical Gift Act §194.240

Respondents Jefferson Memorial Hospital and Christopher Guelbert, RN obtained a valid written consent pursuant to Missouri's Uniform Anatomical Gift Act[3] ("UAGA" or

[2] All statutory cites hereinafter refer to Mo. Rev. Stat. (2002) unless otherwise noted.

[3] Section 194.210 to 194.290

the "Act"). The Act mandates that hospitals obtain written consent for the donation of anatomical gifts. § 194.240. The statute specifically provides that "[a]ny gift by a person designated in subsection 2 of § 194.220 shall be made by a document signed by him or made by his telegraphic, recorded telephonic, or other recorded message." § 194.240.5 (emphasis added). The UAGA further delineates the order of priority in obtaining written consent, including: (1) attorney-in-fact; (2) spouse; (3) adult son or daughter; (4) either parent; (5) adult brother or sister; (6) guardian; and (7) any other person authorized to dispose of the body. § 194.220.2. It also requires that the person making the request for the donation of anatomical gifts be a proper hospital designee. § 194.233.[4] And the hospital may only accept the gift if it does not have actual notice of contrary indications by the decedent or notice that the gift is opposed by a member of the same or prior class as the person that made the gift. § 194.220.3. Finally, there are no provisions in Missouri's UAGA that permit oral consent to organ and tissue donation by a person designated in § 194.220.2.[5]

The trial court granted summary judgment in favor of JMH and Guelbert because consent was obtained as required by the UAGA as evidenced by the signed consent

[4] Section 194.233 provides that the CEO of each hospital designate one or more trained persons to request anatomical gifts, which persons shall not be connected with the determination of death.

[5] The only exception to the written consent requirement is "recorded telephonic or other recorded message." § 194.240.5 (emphasis added).

document. (L.F. 186, 337). The Eastern District Appellate Court reversed summary judgment as to the hospital and Guelbert based on what the Court considered fact issues. Specifically the Court found a "factual dispute as to the representations Guelbert made to Appellant in the course of procuring her consent to donate decedent's eyes, bone and tissue" and "diametrically opposed accounts of the discussion with respect to the explanation of what exactly would be donated." Schembre v. Mid America Transplant Services, et al., 2003 WL 21692986 at 6 (Mo. Ct. App. 2003). In its Opinion, the Eastern District clearly applied an informed consent standard that is not written into Missouri's statute. Missouri's UAGA requires the hospital to obtain written consent of the appropriate surviving relative or class member in cases involving a decedent. §194.220. At no place in Missouri's UAGA is the duty of informed consent put forward.[6] The

[6] While the Missouri UAGA only requires that consent be obtained, at least one state's organ donation statute clearly requires that the donee obtain informed consent. See section 39-3413A of the Idaho Anatomical Gift Act which provides:

REQUIREMENTS FOR INFORMED CONSENT. In the absence of a document of gift or other evidence of an individual's intention to make or refuse to make an anatomical gift, the following information shall be provided to any person or persons, listed in section 39-3404(1), Idaho Code, approached for purposes of obtaining informed consent:

(1) A confirmation of the donor's identity and his or her clinical terminal condition;

(2) A general description of the purposes of anatomical gift donation;

(3) Identification of specific organs and/or tissues, including cells, that are being requested for donation, provided that subsequent information on the specific gifts recovered shall be supplied;

(4) An explanation that the retrieved organs and/or tissues may be used for transplantation, therapy, medical research or educational purposes;

(5) A general description of the recovery process including, but not limited to, timing, relocation of the donor if applicable, and contact information;

(6) An explanation that laboratory tests and a medical and/or social history will be completed to determine the medical suitability of the donor and that blood samples from the donor will be tested for certain transmissible diseases, including testing for HIV antibodies or antigens;

(7) An explanation that the spleen, lymph nodes and blood may be removed, and cultures may be performed, for the purpose of determining donor suitability and donor and recipient capability;

(8) A statement granting access to the donor's medical records and providing that the medical records may be released to other appropriate parties;

(9) An explanation that costs directly related to the evaluation, recovery, preservation and placement of the organs and/or tissues will not be

UAGA does not require that the person who obtains consent test the understanding of the consenting individual or verify that the gifting individual fully appreciates the procedure by which the organs and/or tissue will be harvested. Missouri's UAGA only requires that any consent to a gift by a person designated in § 194.220.2 be made by a document signed by him or made by his telegraphic, recorded telephonic or other recorded message. § 194.240.5.

In the case at bar, Christopher Guelbert, RN complied with Missouri's UAGA by obtaining written consent. (L.F. 208).[7] Consent was obtained from the appropriate class

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charged to the family members of the donor; and

(10) An explanation of the impact the donation process may have on burial arrangements and on the appearance of the donor's body.

[7] While no Missouri cases have addressed the issue of consent regarding organ and tissue donations under Missouri law, consent to medical or surgical treatment may be manifested expressly by oral or signed agreement or impliedly by conduct. Wilkerson v. Mid-America Cardiology, 908 S.W.2d 691, 699-700 (Mo. Ct. App. 1995). Here, Mrs. Schembre expressly signed an agreement authorizing the donation of eyes and bones without any limitations. (L.F. 208, 222, 247-48). In the absence of a written document, the family's understanding of the scope of consent may create a factual dispute, however, once Mrs. Schembre's consent was reduced to writing as required by the UAGA, the written consent controls. See, e.g., Wilkerson, 908 S.W.2d at 693-94. (Mo. Ct. App. 1995). (In a dispute as to whether plaintiff expressly or

member (the spouse) in a signed document. §§ 194.240.5 and 194.233.4. (L.F. 208). There is no evidence that Mr. Guelbert was not the appropriate person making the request. § 194.233 (L.F. 82). The record contains no indication that the decedent, Frank Schembre, opposed the gift, or that a member of the same class or prior class opposed the gift. § 194.220.3. Consent for the gift was obtained by the methods specified in §§ 194.240 and 194.233.4. (L.F. 208). Consent to the gift was signed by the proper person as designated in § 194.220.2 and in accordance with § 194.240.5. (L.F. 208). Finally, there is no indication in the record that any member of the appropriate class amended the gift or revoked the signed consent form prior to the harvesting of the anatomical gifts.[8]

Persons who obtain written consent for the donation of anatomical gifts and comply with the terms of Missouri's UAGA are immune from suit. Section 194.270 of Missouri's UAGA provides the affirmative defense of immunity from suit for those persons requesting anatomical donations made pursuant to the Act. The statute provides:

> A person who acts without negligence and in good faith in accord with the terms of this act or with the anatomical gift laws of another state or a foreign country is not

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impliedly consented to an angioplasty where no written consent was obtained, the family members were allowed to testify about their understanding as to whether consent was given).

[8] In fact, the Missouri UAGA only provides for a "Donor" to orally amend or revoke a gift following written consent, §§194.210(3) and 194.260. The Act has no provision for the oral amendment or revocation of a gift by anyone other than the Donor. Id.

liable for damages in any civil action or subject to prosecution in any criminal proceeding for his act.[9]

§ 194.270.3 (emphasis added).

The clear wording of the statute indicates that a person who acts without negligence and in good faith in accord with the terms of the Missouri Act or in accord with the anatomical gift laws of another state or foreign country is immune from civil liability. § 194.270.3. Missouri's UAGA specifically states that the Act "shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it." § 194.280. The clear intent of the Missouri legislature is to make this statute consistent with the anatomical gift laws of other states or foreign countries and to provide immunity to those persons who act in accordance with the provisions of the statutes.

[9] Missouri's Uniform Anatomical Gift Act was originally adopted in 1969. The Act has been amended several times, however, the immunity provision in § 194.270 has never been revised from its original language in 1969. See, for example, 1999 MO HB 994, 2001 MO HB 291, 2001 MO SB 136, 2002 MO HB 1198 regarding proposed changes which would have removed the "without negligence" language. Until recently, no other state in this country required that an individual act without negligence and in good faith in order to obtain immunity from liability. In 2002, Florida adopted the additional "without negligence" language, but no cases have been decided under Florida's new statute. Fla. Stat. § 765.517(5) (2002).

All 50 states and the District of Columbia have adopted the UAGA.[10] In 1969, Missouri adopted the 1968 version of the UAGA and currently, after several amendments, it now contains variations from the 1987 UAGA. See §§ 194.210 – 194.290 R.S.Mo. The main purpose of the immunity provision of the UAGA is to increase the supply of donations by protecting the individuals involved in the organ and tissue donation process. The preface to the 1968 UAGA identifies the important purposes behind it.

> Wherever adopted . . . [the 1968 UAGA] will encourage the making of anatomical gifts, thus facilitating therapy involving such procedures. When generally adopted, . . . uncertainty as to the applicable law will be eliminated and all parties will be protected. At the same time the Act will serve the needs of the several conflicting interests in a manner consistent with prevailing customs and desires in this country respecting dignified disposition of dead bodies.

Unif. Anatomical Gift Act, Preface (1968).

Although Missouri adopted the UAGA in 1969, this is a case of first impression in this state. Other states, however, have addressed the issue of immunity pursuant to the UAGA. Cases decided under the immunity provision of the UAGA in other jurisdictions, regarding the requesting of donations and obtaining consent, have gone so far to as to hold that even where valid consent was not obtained, hospitals and healthcare providers are immune from suit in situations where efforts have been made to locate, identify and obtain consent of a family member. See Kelly-Nevils v. Detroit Receiving Hospital, 526 N.W.2d 15 (Mich. Ct. App. 1994) (hospital relied in good faith on consent by purported

[10] Unif. Anatomical Gift Act, Prefatory Note (1987).

brother); Nicoletta v. Rochester Eye & Human Parts Bank , Inc., 519 N.Y.S.2d 928 (N.Y. Sup. Ct. 1987) (relied in good faith on consent from purported wife); Brown v. Delaware Valley Transplant Program, 615 A.2d 1379 (Pa. Sup. Ct. 1992) (relied in good faith on state police efforts to locate next of kin and no judicial proceeding authorizing hospital's decision); Hinze v. Baptist Memorial Hospital No. 9, 1990 WL 121138 (Tenn. Ct. App. 1990) (relied in good faith on consent from purported grandson). In the case at bar, there is no dispute that the hospital relied in good faith on the written consent of the spouse of the decedent, Thelma Schembre. (L.F. 208).

Other cases have found that hospitals and health care providers are immune from suit "where because of confusion, an organ is removed without genuine consent." Lyon v. United States, 843 F. Supp. 531, 536 (D. Minn. 1994). In the Lyon case, decedent's eyes were removed even though his next of kin had specifically refused consent for tissue donation. Id. The court held that the doctor who obtained consent for an autopsy on the eye donation form was not liable because he acted in good faith. Id. at 536. Similarly, in Ramirez v. Health Partners of Southern Arizona, 972 P.2d 658, 660 (Ariz. Ct. App. 1998), the family specifically scratched out the word "bone" on the consent form and wrote on the form "nothing disfiguring, family will want a viewing with a short sleeve low cut top." Where the hospital miscommunicated the family's wishes and bone was removed, the court held that the hospital had immunity from civil liability pursuant to the statute, absent any showing of bad faith. Id. at 663.

In the case at bar, JMH and Guelbert are immune from liability pursuant to § 194.270.3 because they acted without negligence and in good faith in following the

provisions of the Act. Consent was properly requested from the deceased's family. (L.F. 220). A valid consent form was executed by deceased's spouse for the donation of eyes and bone. (L.F. 208). And, eyes and bone were removed from the deceased. (L.F. 271-74). There are simply no facts to support a claim of negligence and/or bad faith that would preclude Respondents from obtaining immunity under the terms of the Act.

In its decision, the Court of Appeals appears to have ignored the signed consent form and elected to submit the issue of consent to the jury. If allowed to stand, this decision would preclude a hospital's ability from ever establishing the affirmative defense of proving immunity from suit, which is one of the cornerstones of the UAGA. The decision implies that the matter of consent would always be construed as an issue of fact and always need to be tried before a jury. Immunity would no longer be available to the hospital if the gifting individual merely alleged that the signed consent is not what they agreed to or remembered. This would render the immunity provision of the Act meaningless.

Furthermore, the Court of Appeals' decision, which permits family member's oral testimony to invalidate a signed consent is contrary to established Missouri case law and completely nullifies Missouri's UAGA.[11] Nurses already have a very difficult task

[11] The only cases in which the Missouri Courts have permitted plaintiffs to testify about their understanding of the representations made to them after signing a written consent form are informed consent cases involving physicians and not nurses. See e.g. Wuerz v. Huffaker, 42 S.W.3d 652 (Mo. Ct. App. 2001) (patient explained her understanding of what procedure was to

approaching a family who has just lost a loved one.[12] That task becomes even more difficult if a valid consent form signed by both the decedent's spouse and the requesting nurse is now open to interpretation, alteration and revision. If the spouse and family are distraught, do not remember what they agreed to, or later simply react to the death of their loved one, the family can defeat claims of immunity by testifying that they did not understand and did not agree to the donation. One of the clear purposes of the UAGA is to avoid these situations and protect hospitals from these types of allegations, a fact which the Appellate Court failed to appreciate.

As hospitals in Missouri attempt to decrease their liability as a result of the Court of Appeals' Opinion, there will be an inevitable decrease in organ and tissue donations.[13]

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be done because consent form did not include the procedure done by surgeon); Baltzell v. Baptist Medical Center, 718 S.W.2d 140 (Mo. Ct. App. 1986) (directed verdict in favor of hospital and physician on failure to obtain informed consent; reversed as to physician); Kinser v. Elkadi, 674 S.W.2d 226 (Mo. Ct. App. 1984) (plaintiff contradicted the information on the consent form in an informed consent case against a physician).

[12] One study found that 30% of families of potential donors were never asked about consenting to donation despite the legal obligation to do so under the required request laws. See, *Douglas, Organ Donation, Procurement & Transplantation: The Process, The Problems, The Law*, 65 UMKC L. Rev. 201, 216 (1996).

[13] Section 194.223.1 R.S.Mo. permits CEOs to designate a representative of an organ or tissue procurement organization (OPO) to obtain consent. Even though the hospital is mandated to

Hospital employees would become hesitant to request consent if the grieving family could later undo the consent, sue the hospital, and preclude the hospital from claiming immunity under Missouri's UAGA. Therefore, one of the primary purposes of the UAGA, which is to "encourage the making of anatomical gifts", would be defeated in Missouri.[14] For these reasons, the Court of Appeal's Opinion appears to be directly at odds with the intent of the legislation.

Respondents JMH and Guelbert complied with the UAGA in obtaining Appellant Thelma Schembre's written consent to the donation of her husband's eyes and bones and, as such, the trial court did not err in granting summary judgment as a matter of law. This

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request organ and tissue donation, the actual obtaining of the written consent may be shifted to the organization doing the retrieval of tissue in order to decrease the hospital's exposure. The logistical problem of having the OPO representative come to the hospital immediately after every patient's death to obtain written consent from the family is not consistent with the goals of the UAGA.

[14] As of December 5, 2003, there were 83,630 candidates in the nation waiting for organ transplants (http://www.unos.org). In the MTS service area, in 2001 there were 1,721 patients waiting for an organ transplant, which was up from 1,684 in 2000 (http://www.mts-stl.org/Understanding/VitalStats/stats.phtml). Additionally, in 2002 there were 94 organ donors in the MTS service area, down from 107 in 2001, and 604 bone donors in the MTS service area, up from 585 in 2001 (http://www.mts-stl.org), 2002 Annual Report to the Community.

Court should reverse the decision of the Eastern District and hold that summary judgment was appropriate.

B. Respondents Jefferson Memorial Hospital and Christopher Guelbert, RN Acted In Good Faith In Accord With The Terms of Missouri's Uniform Anatomical Gift Act In Obtaining Thelma Schembre's Consent For The Donation Of The Eyes And Bones Of Her Deceased Husband

Respondents Jefferson Memorial Hospital and Christopher Guelbert, RN acted in good faith[15] in accord with the terms of Missouri's UAGA in obtaining Thelma Schembre's consent for the donation of the eyes and bones of her deceased husband and are therefore entitled to immunity under Missouri's UAGA § 194.270. Good faith has been defined in other UAGA cases as an "honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage." See Lyon v. United States, 843 F. Supp. 531 (D. Minn. 1994); Andrews v. Alabama Eye Bank, 727 So.

[15] Although no Missouri cases have construed the statute in question, decisions of other states that have also adopted the UAGA have held that the "good faith" question is a matter of law. See Andrews v. Alabama Eye Bank, 727 So. 2d 62 (Ala. 1999); Ramirez v. Health Partners of Southern Arizona, 972 P.2d 658 (Ariz. Ct. App. 1998); Bauer v. North Fulton Medical Center, Inc., 527 S.E.2d 240 (Ga. Ct. App. 1999); Kelly-Nevils v. Detroit Receiving Hospital, 526 N.W.2d 15 (Mich. Ct. App. 1994); Rahman v. Mayo Clinic, 578 N.W.2d 802 (Minn. Ct. App. 1998); Brown v. Delaware Valley Transplant Program, 615 A.2d 1379 (Pa. Sup. Ct. 1992).

2d 62 (Ala. 1999); Ramirez v. Health Partners of Southern Arizona, 972 P.2d 658 (Ariz. Ct. App. 1998); Rahman v. Mayo Clinic, 578 N.W.2d 802 (Minn. Ct. App. 1998); Kelly-Nevils v. Detroit Receiving Hospital, 526 N.W.2d 15 (Mich. Ct. App. 1994); Nicoletta v. Rochester Eye & Human Parts Bank, Inc., 519 N.Y.S.2d 928 (N.Y. Sup. Ct. 1987). No malice or fraud has been suggested or proven in the present case. Further, unlike "bad faith" cases, there is no evidence that Guelbert misled Mrs. Schembre into signing the consent form to seek an unconscionable advantage. See Perry v. St. Francis Hospital and Medical Center, Inc., 886 F. Supp. 1551, 1559 (D. Kan. 1995).

In cases such as Perry, the courts have held that certain elements must be present to defeat a claim of good faith immunity. In Perry, instead of accepting the plaintiff's initial negative response, the nurse misrepresented the procedure to be done and misrepresented her intention to inform the retrieval team of the limited donation. Id. The court found that the nurse "lacked an honest belief in what she told the plaintiffs and misled them into signing the consent while knowing their opposition to the removal of [decedent's] eyes and bones." Id. at 1559. It found "evidence of more than a mere mistake, bad judgment or understandable confusion," but rather "a conscious or intentional wrongdoing carried out for a dishonest purpose or furtive design." Id. In the case at bar, there is no evidence that any of these elements are present.[16]

[16] In the Eastern District's appellate decision in this case, the Court cited erroneous facts in their Opinion reversing summary judgment. The Court stated that "[i]nitially, Appellant declined to give consent to any donation, but after discussing with her children decedent's wish

Ramirez v. Health Partners of Southern Arizona, 972 P.2d 658 (Ariz. Ct. App. 1998) provides additional insight into claims of good faith immunity and distinguished the Perry case. In Ramirez, the Court found that Perry provides that the good faith immunity provision, including the phrase "in accord with the terms of this act", extends protection "in all instances but where the challenged actions violate or exceed the terms of UAGA and are taken without a good faith effort to comply with UAGA." Ramirez, 972 P.2d at 662. Again, in the present case, there is no evidence that Respondents made anything less than a "good faith effort to comply" with Missouri's UAGA. Id. Moreover, there is no evidence of intentional wrongdoing carried out for a dishonest purpose or furtive design. Perry, 886 F. Supp. at 1559. At most, if the facts are construed in favor of the Appellants, Mrs. Schembre's wishes communicated to the unidentified female nurse were miscommunicated to the hospital or to MTS and more bone was removed than she

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to help people, she agreed to donate his corneas". Schembre v. Mid-America Transplant Association, et al., 2003 WL 21692986 at 1 (Mo. Ct. App. 2003); and "[i]nitially, Appellant was opposed to making any donation. However, after speaking with Guelbert in great detail, she consented." Id. at 6. There is absolutely no evidence in the record that Thelma Schembre initially declined to give consent or was initially opposed to making any donation. (L.F. 109-111). As the basis for its Opinion, The Eastern District's factual misstatement implies that Guelbert coerced consent and creates a disputed fact issue where none exists.

wished.[17] Under Ramirez, where the hospital miscommunicates the family's wishes, the hospital has immunity absent a showing of bad faith. Ramirez, 972 P.2d at 663.

In the Eastern District's appellate decision in this case, the Court properly applied the good faith standard in considering Respondent MTS' claim to immunity. Schembre, 2003 WL 21692986. In its decision, the Eastern District cited the ruling in Nicoletta v. Rochester Eye & Human Parts Bank, Inc., 519 N.Y.S.2d 928 (N.Y. Sup. Ct. 1987) to establish the objective standard for good faith and thereby determine that summary judgment was appropriate in anatomical gift cases. The portion of the case cited by the Eastern District points directly to the New York Court's ruling that the UAGA creates "an objective standard by which good faith of a donee could be measured." Schembre, 2003 WL 21692986 at 5 (citing Nicoletta, 519 N.Y.S.2d at 931) (emphasis added). The New York Court found that the *objective standard is created by the terms of the UAGA* itself

[17] Mrs. Schembre testified in her deposition that she signed the consent form in the presence of an unidentified female. (L.F. 248). When she asked the unidentified female whether she needed to read the fine print, the female told her that it was just a consent form. (L.F. 248, 256). Mrs. Schembre alleged that she thought that the unidentified female was writing down on the form that only two to four inches of the leg bone between the knee and ankle would be removed. (L.F. 247). This fact is not material based on the signed consent form and the fact that no writing appears on the form except for Christopher Guelbert's writing and Thelma Schembre's signature. (L.F. 208, 222, 224, 248, 256). There are also no limitations or restrictions written in next to the word "bone" on the consent form. (L.F. 208).

and is evidenced by the statutory language, which states "in good faith in accord with the terms of this article." Nicoletta 519 N.Y.S.2d at 931.

The Eastern District Court appears to have agreed with the New York Court's ruling that "good faith," when applied to organ and tissue donation cases, is not a generalized good faith standard. Id. Rather, the Missouri Court recognized that there are specific criteria laid out in the UAGA that define how the donee's conduct should be measured regarding claims of "good faith." Id. Because an objective criteria exists, good faith is properly a question for the court and the issue of good faith need not be submitted to a trier of fact. Schembre, 2003 WL 21692986 at 5.

In the case at bar, the Missouri UAGA (like the New York version) clearly sets forth the specific criteria upon which good faith should be judged. Missouri's statute grants immunity to a person who acts without negligence and in good faith in accord with the terms of this Act. §194.270. The Act sets out the "statutory scheme" for effecting an anatomical gift, identifying the class of individual entitled to make the gift, and the requisite good faith efforts to be undertaken to ensure that the gift is not null and void. Schembre, 2003 WL 21692986 at 5; §§194.210-194.290. There is no evidence that Respondents JMH and Guelbert did not comply with the criteria and, specifically, no evidence that Respondents did not make a good faith effort to comply with the terms of the Act. In this case, no set of facts has been offered upon which a trier of fact could find bad faith or conclude that there was a lack of a "good faith effort to comply with the terms of the act." Ramirez, 972 P.2d at 662.

Respondents JMH and Guelbert satisfied the good faith requirements of the immunity portion of the Act and, as such, the trial court did not err in granting summary judgment as a matter of law.[18] This Court should reverse the decision of the Eastern District and hold that summary judgment was appropriate.

[18] The Eastern District Court of Appeals did not reach the good faith issue as to Respondents JMH and Guelbert, however, based on their analysis of good faith with respect to MTS, Respondents JMH and Guelbert clearly meet the "good faith" requirements for immunity under the statute. See Schembre 2003 WL 21692986 at 5-6.

C. Respondents Jefferson Memorial Hospital and Christopher Guelbert, RN Acted Without Negligence In Accord With the Terms of Missouri's Uniform Anatomical Gift Act In Obtaining Thelma Schembre's Consent For Donation Of The Eyes And Bones Of Her Deceased Husband

Respondents Jefferson Memorial Hospital and Christopher Guelbert acted without negligence in accord with the terms of Missouri's UAGA in obtaining Thelma Schembre's consent for the donation of the eyes and bones of her deceased husband and are therefore entitled to immunity under Missouri's UAGA. § 194.270. While other jurisdictions have defined the "good faith" standard for immunity under the UAGA, no other jurisdictions have determined the "without negligence" standard to be applied to the UAGA.[19] In determining the "without negligence" standard to be applied to Missouri's UAGA, the Court must look at the duties enumerated in the Missouri UAGA and, under the statutory scheme, apply the standard to the duties involved in obtaining consent.

Generally, in cases of negligence, a plaintiff must prove that a defendant owed a duty to plaintiff, that the defendant breached that duty, and that plaintiff's injury was proximately caused by the defendant's breach. Brickey v. Concerned Care of Midwest, Inc., 988 S.W.2d 592, 596 (Mo. Ct. App. 1999). At issue in the present case is whether the duties regarding organ and tissue donation requests were met. In order to make this determination, the nature and extent of the duty must be examined. Based on Missouri's

[19] See Footnote 9, *supra*.

UAGA and the case law from other jurisdictions interpreting their own state's UAGA, negligence in Missouri organ and tissue donation cases is narrowly defined. §194.270.

Missouri's UAGA outlines the standards and duties that a hospital is required to follow when requesting anatomical gifts. § 194.233. The Act does not impose a general negligence or medical negligence standard upon those that rely upon its provisions. Rather, the language of the Missouri UAGA states that findings of negligence are limited to those persons who negligently fail to comply with the terms of the Act. §194.270.3. Specifically, the language of § 194.270.3 of Missouri's UAGA states that a person will be granted immunity as to any civil action if the person acts "without negligence… in accord with the terms of this act…" (emphasis added). This is not the same as a general negligence standard. Therefore, if a person acts without negligence in an effort to comply with "the terms of this act," that person is entitled to claim immunity. §194.270.

As previously outlined, Missouri's UAGA specifies the statutory requirements for obtaining consent. The request for organ donation shall be made to the appropriate party and in the order of priority specified in §§ 194.220.2 and 194.233.2. The request should be made by a proper designee. §194.233. A hospital may only accept the gift if it does not have actual notice of contrary indications by the decedent or notice that the gift is opposed by a member of the same or prior class as the person that made the gift. § 194.220.3. Consent for the gift shall be obtained by the methods specified in §§ 194.240 and 194.233.4. And any gift by the appropriate person shall be made by a document signed by him or made by his telegraphic, recorded telephonic or other recorded message. § 194.240.5.

In the case at bar, the hospital complied with all of the above required "terms of the act". § 194.270(3) (L.F. 208, 222, 247-48). Consent was obtained from the appropriate class member (the spouse) in a signed document. §§ 194.240.5 and 194.233.4. (L.F. 208). There is no evidence that an improper individual made the request. §194.233 (L.F. 82). The record contains no indication that the decedent opposed the gift or that a member of the same class or prior class opposed the gift. § 194.220.3. Consent for the gift was obtained by the methods specified in §§ 194.240 and 194.233.4. (L.F. 208). And consent to the gift was signed by the proper person as designated in § 194.220.2 and in accordance with § 194.240.5 (L.F. 208). There are no material facts in dispute as to Respondents' compliance with the provisions of the Act.

The narrow statutory interpretation of "duty" is akin to the interpretation of the good faith requirement put forward in the Nicolletta decision and cited by the Missouri Appellate Court in this case. Schembre, 2003 WL 21692986 at 5 (citing Nicoletta , 519 N.Y.S.2d at 931). In the portion of Nicolletta cited by the Eastern District, the Missouri Court acknowledges that there is an "objective standard" upon which good faith may be judged. Id. However, the provision of the New York UAGA at the heart of the Nicoletta decision does not contain negligence language.[20] Still, the applicable "good faith"

[20] New York's statute specifies that "[a] person who acts in good faith in accord with the terms of this article or with the anatomical gift laws of another state is not liable for damages in any civil action or subject to prosecution in any criminal proceeding for his act." N.Y. Pub. Health Law §4306.3 (McKinney 2001) (emphasis added).

language and statutory scheme of the New York statute is nearly identical to the Missouri Act. While the New York Statute is silent on negligence, the language of the Missouri Act indicates that an objective standard should also be used in determining issues of negligence. In Missouri, in addition to "good faith in accord with the terms of the act," the Act requires those seeking immunity to act "without negligence… in accord with the terms of the act." §194.270. As in good faith, the statutory scheme establishes an objective standard and criteria upon which negligence is to be judged.[21]

It appears that the Eastern District did not apply the negligence provision of the Act as written by the legislature. In the Appellate Court's decision, it misquotes §194.270.3 as reading "[a] person who acts without negligence and in good faith **and** in accord with the terms of this act…" Schembre, 2003 WL 21692986 at 3 (emphasis added). The addition of the second "and" changes the meaning of the statute and defeats the legislative intent. By including the additional "and," the Eastern District severs the qualifying criteria for judging negligence and good faith and imposes general tort standards for negligence and good faith where they were not intended.

[21] The Eastern District found that because there was a discrepancy in the family's understanding of what would be donated despite the valid unambiguous signed consent, that the issue had to be submitted to the jury. The Court of Appeals is allowing the family's oral testimony to undo a signed document and to establish a breach of a duty of informed consent that does not appear in the statute and that the legislature never intended.

The Eastern District's use of a broader negligence standard is evidenced by the Court's citing of cases in which summary judgment was considered in the context of allegations of general and/or medical negligence. Id. at 6. In its decision, the Court cites a series of cases for the proposition that "[s]ummary judgment is not as feasible in negligence cases as it may be in other types of cases." Id. (citing Hammonds v. Jewish Hosp. Of St. Louis, 899 S.W.2d 527, 529 (Mo. Ct. App. 1995) (additional cites omitted)). Importantly, this quote and proposition are attributed to cases that do not concern organ donation. In organ donation cases subject to the Missouri UAGA, the standard for determining negligence is more narrow. The standard put forward in the Missouri UAGA is one of "without negligence… in accord with the terms of the act" and not the broader negligence standard. §194.270. This means that as long as the hospital acts without negligence in an attempt to comply with the terms of the Act, the hospital is entitled to immunity.[22] Therefore, there is an objective standard, the issue of negligence need not be submitted to a jury, and grants of summary judgment are feasible.

If the Eastern District's interpretation of negligence under the Act were correct, it would effectively eliminate the immunity provision of the UAGA. As cited in the Eastern District decision, the standard imposed suggests that a person must meet three requirements to qualify for immunity. The "person" must act without general negligence,

[22] In Ramirez, the Court rejected plaintiff's argument that strict compliance was necessary in order for immunity to attach and held that "good faith efforts to comply with the Act's mandatory procedures" were sufficient to immunize the donee. Ramirez, 972 P.2d at 662.

and act in general good faith, and act in accord with the provision of the UAGA. Schembre, 2003 WL 21692986 at 3 (citing §194.270). This standard is broader than that contemplated by the legislature. Further, the Court's standard is not supported by the language of the statute, is not supported by case law, and would functionally defeat nearly every claim to immunity under the Act. Because general negligence and general good faith are usually factual issues, immunity would never be granted.[23] Certainly, this is not the intent of the legislature or the UAGA, and the narrower standard is the appropriate interpretation of the Missouri Act.

Respondents JMH and Guelbert satisfied both the "good faith" and "without negligence" requirements of the Missouri UAGA and, as such, the trial court did not err in granting summary judgment as a matter of law. This Court should reverse the Eastern District's decision and hold that summary judgment was appropriate.

[23] In Ramirez, 972 P.2d 658, the Court found sound policy reasons for requiring more than general negligence to impose liability on those persons who participate in good faith in the organ procurement process. Ramirez, 972 P.2d at 666.

D. There Are No Genuine Facts In Dispute And Respondents Jefferson Memorial Hospital and Christopher Guelbert, RN Are Entitled To Summary Judgment As A Matter Of Law

In addition to the proof that consent was obtained pursuant to Missouri's UAGA, and the fact that all provisions of the Missouri UAGA were followed, there are no other genuine factual disputes as to what happened in the case. Summary judgment will be upheld on appeal if there is no genuine dispute of material fact and movant is entitled to judgment as a matter of law. ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993) . Judge Kramer's May 17, 2002 Order granting summary judgment for Respondent MTS stated that "[t]he pleadings and discovery material contained in the Court file in support of Defendant's [MTS] Motion for Summary Judgment demonstrates that there is no real factual dispute as to what happened in the case." (L.F. 186-87). In granting summary judgment to Respondents JMH and Guelbert, Judge Kramer specifically referenced his May 17, 2002 Order and granted summary judgment "for the same basic reasons as the granting to Defendant MTS." (L.F. 337). None of the facts alleged in Respondents JMH and Guelbert's Motion for Summary Judgment are in dispute. (L.F. 188-190). All of the facts alleged by Respondents were admitted by Appellants or are considered judicial admissions because they were admitted

in Appellants' response to Respondent MTS' Motion for Summary Judgment.[24] (L.F. 159-62, 288-91).

A motion for summary judgment involves a determination by the trial court based on the pleadings, depositions and affidavits properly before the court that there exists no genuine material issues of fact and that the movant is entitled to judgment as a matter of law. Gunning v. State Farm Mut. Auto. Ins. Co., 598 S.W.2d 479, 481 (Mo. Ct. App. 1980). Judicial admissions have been held to be "a more or less formal act done in the course of judicial proceedings which waives or dispenses with the production of evidence and concedes for the purpose of the litigation that a certain proposition is true." Hewitt v. Masters, 406 S.W.2d 60, 64 (Mo. 1966). The rationale of such admissions is to act as a substitute for evidence and to obviate the need for evidence relative to the subject matter of the admission. State Farm Mutual Auto Ins. Co. v. Worthington, 405 F.2d 683, 686

[24] In Appellants' Response to Respondents JMH and Guelbert's Statement of Undisputed Facts in their Motion for Summary Judgment, Appellants denied or admitted with qualifications four Statements of Undisputed Facts which had been admitted without qualifications in Appellants' Response to Respondent MTS' Statement of Facts. (L.F. 159-62, 288-91). (See Appendix A_8 to A_{10} for Respondents' Statement of Undisputed Fact and Appellants' Response). Appellants' Responses to Respondents' Statement of Facts Nos. 5, 6, 7 and 9 constitute judicial admissions because they were admitted by Appellants in response to Respondent MTS' Motion for Summary Judgment. (L.F. 159-62). See Mitchell Engineering Company v. Summit Realty Co., Inc., 647 S.W.2d 130, 140-41 (Mo. Ct. App. 1982).

(8th Cir. 1968). Therefore, in addition to the facts admitted by Appellants in their Response to Respondents Jefferson Memorial Hospital and Christopher Guelbert's Motion for Summary Judgment, the following facts constitute judicial admissions:

5. Mr. Guelbert advised the family that the deceased was a candidate for tissue donation and specifically bone and corneas. (L.F. 160, 189).

6. Mr. Guelbert checkmarked the appropriate boxes on the Organ and Tissue Donation Consent Form, which allow for the removal of the "Eyes" and "Bone" only. (L.F. 160, 189-90).

7. Mrs. Schembre was provided with the Organ and Tissue Donation Consent Form which she signed. (L.F. 160, 190).

9. No limitations or restrictions were written next to the word "Bone" on the Consent Form. (L.F. 161, 190).

The trial court properly found that no negligence or bad faith existed under the UAGA based on the signed consent form and the undisputed facts. (L.F. 208). Thus, pursuant to the immunity provisions of Missouri's statute, summary judgment was appropriate.[25]

[25] Appellants allege in their brief that Judge Kramer determined that immunity was available if a person acted in good faith alone. (Appellants' Brief at pg. 24). This is incorrect. In Judge Kramer's ruling on the Motion for Summary Judgment, he cited the language from the statute and the standard that the limited immunity attaches where the donee is "not negligent and acts in good faith". § 194.270.3 (emphasis added). (L.F. 186-87). Thus, the trial judge found that

Appellants argue that the consent form did not accurately reflect Mrs. Schembre's understanding[26] and that a "genuine issue of material fact exists concerning whether [Respondent] Christopher Guelbert," . . . "was negligent in his explanation and representations concerning the amount of bone to be removed from the body of Frank Schembre, Sr." (Appellants' Brief, pgs. 26, 28). Appellants state in their Brief that after reviewing the depositions of "Respondent Christopher Guelbert, and Appellants Thelma Schembre, Laurie Laiben and Bobby Joe Schembre, it is apparent there is a dispute of material fact concerning those representations and the discussion which occurred." (Appellants' Brief, pgs. 28-29). Appellants fail to cite any pages in the Legal File to support or to document the above statements in their brief.[27] (Appellants' Brief, pgs. 26,

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based on the signed consent, no negligence or bad faith existed, no acts were in dispute and a jury could not find that JMH and Guelbert were negligent.

[26] Appellants also argue that the jury should consider the binding effect of the consent form signed within one hour of her husband's death. (Appellants' Brief, pg. 26). Any time that a family member signs a document consenting to the donation of a loved one's organs or tissue, it is signed within a short time before or after the loved one's death. Certainly this is one of the policy reasons for the adoption of the UAGA and the reason why immunity attaches when hospital personnel act without negligence and in good faith in obtaining consent to organ and tissue donation.

[27] In Appellant's Reply Brief, Appellants attempt to correct several deficiencies of their original brief by adding citations to the Legal File. For purposes of this case, the citations merely

28-29). Under the language of the Missouri UAGA, the fact that Mrs. Schembre signed a valid consent form precludes a finding of negligence even if Mrs. Schembre's "understanding" was incorrect.[28]

Appellants also state that a disputed material fact exists "as to whether another agent or employee of Respondent, Jefferson Memorial Hospital, also spoke with Appellants, Thelma Schembre, Laurie Laiben and Bobby Joe Schembre on the evening of November 28, 1998 and made additional incorrect statements and representations

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demonstrate that there was a conversation that took place between Thelma Schembre and Christopher Guelbert, RN in which a request for bone and cornea donation was made, and that Thelma Schembre signed the completed appropriate consent form.

[28] Appellants seem to argue that Mrs. Schembre's consent was not informed because it did not reflect her understanding. Under Missouri law, an action for lack of informed consent is an action against a physician and not a nurse. A hospital has no duty to inform a patient of the risks of surgery and possible alternative methods of treatment merely because it furnishes a consent form. Ackerman v. Lerwick, 676 S.W.2d 318, 320-21 (Mo. Ct. App. 1984); Roberson v. Menorah Medical Center, 588 S.W.2d 134 (Mo. Ct. App. 1979). The Appellants, in the case at bar, have failed to allege and prove a cause of action for lack of informed consent. Furthermore, even if a claim for lack of informed consent were pleaded, Appellants failed to identify any expert testimony to establish that disclosures made by the Respondent nurse do not meet the standard of what a reasonable medical practitioner would have disclosed under the same or similar circumstances. Aiken v. Clary, 396 S.W.2d 668, 675 (Mo. Ct. App. 1965).

concerning the usual procedure and amounts of bone removed from the body of a deceased person." (Appellants' Brief, pg. 29). Once again Appellants fail to direct the Court to any pages in the legal file to support or to document their statement.[29] "It is not the function of the appellate court to sift through material furnished by the parties on appeal to determine the exact nature of the evidentiary material submitted to the trial court in a summary judgment proceeding." Landmark North County Bank & Trust Company v. National Cable Training Centers, Inc., 738 S.W.2d 886, 889 (Mo. Ct. App. 1987) (quoting Hill v. Air Shields, Inc., 721 S.W.2d 112, 116 (Mo. Ct. App. 1986)). "Unless the record on appeal demonstrates the documents purportedly relied upon [in the trial court] were properly and timely made a part of the record, we cannot say they were considered by the trial court and they may not be considered on appeal." Landmark, 738 S.W.2d at 889 (quoting Hill, 721 S.W.2d at 116).

Appellants also argue that genuine issues of material fact exist as to whether Respondent Christopher Guelbert was a "designated trained person" pursuant to § 194.233.1 and whether because he was part of the resuscitation effort, he was someone connected with the determination of death. (Appellants' Brief, pg. 29). Again, Appellants do not cite any pages in the Legal File.[30] In support of their argument that Christopher Guelbert was not a designated trained person, Appellants cite the deposition testimony of Jefferson Memorial Hospital's former director of patient care services, Sheri Bramlett.

[29] See Footnote 27, *supra*.

[30] Id.

(L.F. 456-60). Ms. Bramlett's testimony is inconclusive, however. In response to Appellants' question whether she knew whether Christopher Guelbert was ever a designated requestor, she responded "I do not know." (L.F. 458).[31] This testimony does not establish a genuine dispute of fact and certainly is not material to the Appellants' claims in this case to defeat a claim to immunity or a claim to summary judgment.

Appellants also argue in their brief that Respondents failed to comply with a State and/or Federal Statute and as a result, Respondents are negligent per se. (Appellants' Brief, pg. 30). Appellants never alleged in their Petition that Christopher Guelbert was not properly trained to approach families about organ or tissue donation or that he was not a designated trained person. (L.F. 13-22). Appellants never alleged in their Petition that Christopher Guelbert violated a statute and could not be a designated requester because he was connected with the determination of death. (L.F. 13-22). (Appellants' Brief at pg. 29). The person who determines death is a physician and not a nurse. § 194.270.2. In the case at bar, the physician who pronounced Mr. Schembre dead was Dr. Palmer. (L.F. 217). Therefore, there are no facts adduced nor can there be facts adduced that Respondent Christopher Guelbert violated these statutes.

Furthermore, Appellants are precluded from raising the issue of negligence per se or the Designated Request Statute for the first time on appeal. On appeal, "a party is bound by the theory relied on at trial and cannot raise a theory for the first time on

[31] Christopher Guelbert testified that he was trained to request consent for organ or tissue donation. (L.F. 213-14). There are no facts to suggest the contrary.

appeal." California Compensation & Fire Co. v. Industrial Salvage & Wrecking Co., 963 S.W.2d 692, 699 (Mo. Ct. App. 1998) (internal citation omitted). Finally, Appellants have failed to supply any evidence to indicate that Respondents did not make a good faith effort to comply with the terms of the Act or acted negligently in complying with the terms of the Act. §194.270. Thus, Appellants have not established a genuine issue of disputed fact and the trial court did not err in granting summary judgment as a matter of law. This Court should reverse the Eastern District's decision and hold that summary judgment was appropriate.

CONCLUSION

Respondents Jefferson Memorial Hospital and Christopher Guelbert acted without negligence and in good faith in accord with the terms of Missouri's UAGA in obtaining written consent from Appellant Thelma Schembre. Appellants have failed to adduce any facts that Respondents breached their duty to Appellants by failing to comply with any statutory requirement in the Act. Respondents complied with Missouri's UAGA and are entitled to immunity from suit as provided in § 194.270. Summary judgment was appropriately granted because no material issues are in dispute and Respondents Jefferson Memorial Hospital and Christopher Guelbert are entitled to judgment as a matter of law. The Eastern District's ruling regarding Respondents Jefferson Memorial Hospital and Christopher Guelbert's motions for summary judgment should be reversed and the trial court's Order granting summary judgment should be affirmed.

Kenneth C. Brostron #24094
Judith C. Brostron #34983
Micheal A. Chehval #54084
LASHLY & BAER, P.C.
714 Locust Street
St. Louis, MO 63101
(314) 621-2939
(314) 621-6844 (fax)

Attorneys for Respondents
Jefferson Memorial Hospital and
Christopher Guelbert, RN

IN THE SUPREME COURT OF MISSOURI

THELMA SCHEMBRE, et al.,	)	
	)	
Plaintiffs/Appellants,	)	Circuit Court #CV300-0044-CC
	)	Circuit Court of Jefferson County
vs.	)	
	)	Court of Appeals #ED81539
MID AMERICA TRANSPLANT SERVICES, et al.,	)	Court of Appeals, Eastern District
	)	
	)	Supreme Court #SC85585
Defendants/Respondents.	)	

CERTIFICATE OF SERVICE

I hereby certify, in accordance with Supreme Court Rule 84.05(a) that the original and ten (10) copies of Respondents' Substitute Brief, with a floppy disk, in the above-entitled cause were filed this 8th day of December, 2003 with the Clerk of the Supreme Court of Missouri, and two (2) copies of Respondents' Substitute Brief, with a floppy disk, were mailed, postage pre-paid, addressed to Mr. Robert J. Lenze, Robert J. Lenze, P.C., Attorneys for Appellants, 3703 Watson Road, St. Louis, Missouri 63109; Mr. Edward S. Meyer, Rabbitt, Pitzer & Snodgrass, P.C., Attorneys for Respondent Mid-America Transplant Services, 100 South Fourth Street, Suite 400, St. Louis, Missouri 63102-1821; and Mr. Randall D. Sherman, Wegmann, Gasaway, Stewart, Schneider, Dieffenbach, Tesreau & Sherman, P.C., co-counsel for Respondent Jefferson Memorial Hospital, P. O. Box 740, 455 Maple Street, Hillsboro, Missouri 63050.

I hereby certify this brief contains all information required by Missouri Supreme Court Rule 55.03, it complies with the limitations contained in Missouri Supreme Court

Rule 84.06, it contains 9215 words, 830 lines, in Microsoft Word; the disk provided has been scanned for viruses and is virus-free.

Kenneth C. Brostron #24094
Judith C. Brostron #34983
Micheal A. Chehval #54084
LASHLY & BAER, P.C.
714 Locust Street
St. Louis, MO 63101
(314) 621-2939
(314) 621-6844 (fax)

Attorneys for Respondents
Jefferson Memorial Hospital and
Christopher Guelbert

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